

March 31, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Michael Ravnitzky

Date of Filing: February 6, 2008

Case Number: TFC-0001

Michael Ravnitzky filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) issued on January 22, 2008. In that determination, NNSA denied in part a request for information that Mr. Ravnitzky had submitted on March 14, 2006, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NNSA withheld information that was responsive to Mr. Ravnitzky's request after it determined that two responsive documents contained information that was either classified as Restricted Data or Formerly Restricted Data or met the definition of unclassified controlled nuclear information (UCNI). This Appeal, if granted, would require the DOE to release the portions of those two documents that it withheld pursuant to its January 22 determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On March 14, 2006, Mr. Ravnitzky requested copies of 12 audit reports issued by the DOE's Office of the Inspector General (IG). Among the documents the IG identified as responsive to Mr. Ravnitzky's request were Attachment 3 to Report IG-0714 (referred to as Document 2 in the January 22 letter) and Attachment C to Report IG-0619 (referred to as Document 9 in the January 22 letter). Documents 2 and 9 were among the material that the IG referred for a declassification review, and in June 2007 the Office of Document Reviews indicated to the IG which portions of the documents could not be released to Mr. Ravnitzky because they contained classified information or UCNI. Because these two documents originated with NNSA, the IG then forwarded the two documents to NNSA, so that NNSA could consider whether other portions of the documents as well required protection from disclosure pursuant to the FOIA.

NNSA completed its review of Documents 2 and 9 and, on January 22, 2008, provided Mr. Ravnitzky with copies of the two documents from which information had been deleted. In its determination letter, NNSA explained that the deleted portions of the documents “contained information about production of special nuclear material that has been classified as [Restricted Data] and/or nuclear weapons that has been classified as [Formerly Restricted Data] and/or determined to be UCNI pursuant to” the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.* NNSA further explained that, because the Atomic Energy Act exempts these categories of information from public release, such information in Documents 2 and 9 warranted protection from disclosure under Exemption 3 of the FOIA, which provides for withholding material “specifically exempted from disclosure by statute”

The present Appeal seeks the disclosure of the two documents described above in their entirety. In his Appeal, Mr. Ravnitzky contends that the deletion of material from page 10 of Document 2 is “nonsensical.” Mr. Ravnitzky also challenges, on several grounds, the invocation of Exemptions 1 and 3 of the FOIA to withhold of material from pages 15 and 16 of Document 9.*

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1); *accord*, 10 C.F.R. § 1004.10(b)(1). Executive Order 12958, as amended by Executive Order 13292, is the current Executive Order that provides for the classification, declassification and safeguarding of national security information (NSI). When properly classified under this Executive Order, NSI is exempt from mandatory disclosure under Exemption 1. 5 U.S.C. § 552(b)(1); 10 C.F.R. § 1004.10(b)(1).

The Director of the Office of Security (the Director) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information and UCNI. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Deputy Chief for Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed Documents 2 and 9.

* In its determination letter, NNSA invoked Exemption 3 alone to withheld information contained in Documents 2 and 9 from public disclosure. Mr. Ravnitzky claims in his Appeal that some information was deleted from pages 15 and 16 of Document 9 pursuant to Exemption 1. However, as noted below, appellate review of these documents has now determined that Exemption 1 is the proper basis for protecting portions of these documents from public disclosure.

The Deputy Chief reported the results of his review of Documents 2 and 9 in a memorandum dated March 3, 2009. In that review, he determined that, based on current DOE classification guidance, page 10 of Document 2 contains no classified information or UCNI. Pages 15 and 16, however, contain information that is properly classified as NSI by Executive Order 12958, as amended. The information that the Deputy Chief identified as NSI falls with section 1.4(f) of the Executive Order, which exempts from public disclosure information that reveals "United States Government programs for safeguarding nuclear materials or facilities." The Deputy Chief also determined, however, that the majority of the content on pages 15 and 16 of Document 9 is not NSI. The Deputy Chief has provided this Office with copies of those pages from which the NSI has been deleted. Beside each deletion, "DOE (b)(1)" has been written in the margin of the document. The denying official for these withholdings is Michael A. Kilpatrick, Deputy Director, Office of Security and Safety Performance Assurance, Department of Energy.

Based on the Deputy Chief's review, we have determined that Executive Order 12958, as amended, requires the DOE to continue withholding portions of Document 9. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 1, the disclosure is prohibited by executive order. Therefore, those portions of the reviewed documents that the Deputy Chief has now determined to be properly identified as NSI must be withheld from disclosure. Nevertheless, the Deputy Chief has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Deputy Chief's findings, and at his suggestion, we have remanded these two documents to the NNSA for a new review. In that review, NNSA must consider whether it should withhold (a) any portions of page 10 of Document 2 and (b) any portions of pages 15 and 16 of Document 9 not determined to be NSI that were previously withheld from Mr. Ravnitzky. After completing its review, the NNSA should either release page 10 of Document 2 in its entirety and the currently redacted versions of pages 15 and 16 of Document 9, or issue a new determination that provides adequate justification for the withholding of any additional information from those pages that it provides to Mr. Ravnitzky. Accordingly, Mr. Ravnitzky's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

- (1) The Appeal filed by Michael Ravnitzky on February 6, 2008, Case No. TFC-0001, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.
- (2) The National Nuclear Security Administration shall review (a) page 10 of Attachment 3 to Report IG-0714, issued by the DOE's Office of the Inspector General, and (b) the redacted versions of pages 15 and 16 of Attachment C to Report IG-0619, also issued by the

DOE's Office of the Inspector General, which bears markings indicating where all national security information has been properly deleted. Upon completing its review, the NNSA shall either release to Michael Ravnitzky page 10 described above in its entirety and the redacted versions of pages 15 and 16 described above in their entirety, or issue a new determination that provides adequate justification for the withholding of any additional information from the copies it provides to Mr. Ravnitzky.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 31, 2009